OVERSEA-CHINESE BANKING CORP. LTD. *a*

v.

NATIONAL UNION OF BANK EMPLOYEES & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[ORIGINATING MOTION NO. A53 OF 1984]
18 APRIL 1985 *b*

ADMINISTRATIVE LAW: *Certiorari - Application to quash Industrial Court award - Whether the Court had jurisdiction - High Court - Whether it had jurisdiction.*

LABOUR LAW: *Transfer of employee - Whether a "trade dispute" - Award of Industrial Court - Whether a nullity.* *c*

The application was for an order of *certiorari* to quash an award made by the Industrial Court ordering the applicant ("the Bank") to reinstate one of its employees ("Wong") to his former post of book-keeper or to any recognised post established for a Special Grade Clerk. Wong was a Special Grade Clerk who was transferred by the Bank to the Credit Administration Department in the same office without any loss in pay or grade, while investigations were being carried on regarding certain discrepancies found in books maintained by Wong. The Bank had assured the respondent union that the transfer was an interim measure to facilitate investigation. It had at the same time claimed it had a right to transfer its staff between departments in the same office. The matter was referred under s. 26(2) of the Industrial Relations Act 1967 ("the Act") to the Industrial Court, which made the award in the form noted above. *d* *e*

Held:

[1] The Industrial Court heard the reference under s. 26(2) of the Act and therefore had jurisdiction to hear the dispute. The words"connected with" in s. 2 of the Act are wide enough to include not only a dispute on the terms of employment itself but also if the dispute is concerned with the interpretation of the existing terms of employment or with their enforcement. *f*

[2] The Court had jurisdiction to hear the application for an order of *certiorari.* Though s. 33B(1) of the Act provides that an award of the Industrial Court shall be final and conclusive, the provision does not have the effect of ousting the inherent supervisory jurisdiction of the High Court to quash the decision by *certiorari* proceedings if the Industrial Court has acted without or in excess of jurisdiction or if it has done or failed to do something in the course of its inquiry which is of such a nature that its decision is a nullity. *(South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors.* [1980] 2 MLJ 165). *g*

[3] In the circumstances of the case the Industrial Court award was a nullity. The Industrial Court had asked itself the wrong questions. The Bank clearly had the right to transfer its employees under Article 16(1) of Award 117/82 governing the terms of employment, provided by s. 32 of the Act. Further, the order of reinstatement itself was superflous as Wong had not lost his job as a Special Grade Clerk in the Bank. *h*

[Application allowed.]

i

Case referred to:
South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors. [1980] 2 MLJ 165

Legislation referred to:
Industrial Relations Act 1967, ss. 2, 26(2), 32, 33, B(1), 56

For the applicant - C.V. Das (M. Nagarajah with him); M/s Shook Lin & Bok
For the 1st respondent - K.P. Gengadharan; M/s Aziz Abdullah & Co.
For the 2nd respondent - Served; no appearance.

JUDGMENT

Harun Hashim J:

This is an application for an Order of *certiorari* to quash Award No. 252 of 1984 made by the Industrial Court on 31 October 1984 ordering the applicant (Bank) to reinstate its employee, Wong Lee Sim (Wong) to his former post of Book-keeper or to any recognised post established for a Special Grade Clerk.

Wong joined the Bank in September 1960 as a Timescale Clerk. He was promoted to Special Grade Clerk in 1969. In May 1981, he was appointed the Book-keeper of the Accounts Department in the Bank's main branch. In December 1983, the Internal Auditors of the Bank carried out their yearly check of the books maintained by Wong and found certain discrepancies between his books and the subsidiary ledger maintained by another clerk with regard to the entries made in January 1983. By letter of 15 December 1983, the Bank asked Wong to explain the discrepancies. He did so by letter of 19 December. Pursuant to the matters raised by Wong in his explanation, the Bank sent him a letter on 22 December to attend a preliminary inquiry. On the same day the Bank **transferred** Wong from the Accounts Department to the Credit Administration Department in the same office building without any loss in pay or grade.

By letter of 27 December, the respondent Union protested to the Bank that the transfer was unfair because:

(a) Wong was transferred to a post which is not a Special Grade Clerical post; and

(b) Wong is being victimised as a result of the falsifications made by another clerk who had admitted to making the false entries and had since resigned from the Bank.

The Bank's answer is that the transfer was an interim measure to facilitate investigation of the falsifications and in any event it had the right to transfer its staff between departments in the same office at any time at its sole discretion. The Union then complained to the Minister of Labour who referred dispute to the Industrial Court on 17 March 1984. The Bank then applied to the High Court for an order of *certiorari* to quash the Minister's reference and an Order of Prohibition to prohibit the Industrial Court from hearing the reference on the ground that the issue of transfer in this case is not a trade dispute within the definition of the Industrial Relations Act, 1967 (the Act). On 11 May 1984, the High Court dismissed the application on the ground that an Order of *certiorari* is unnecessary and an Order of Prohibition is premature. The Industrial Court proceeded with the hearing resulting in the impugned Award.

Jurisdiction

In this application the Bank, as it did before the Industrial Court, contends that the Court had no jurisdiction to hear the dispute because a 'transfer' in accordance with the terms of employment cannot be the subject-matter of a 'trade dispute' as defined in s. 2 or the Act, which reads -

> Trade dispute means
> any dispute between an employer and his workmen which is connected with the employment
> or
> non-employment
> or
> the terms of employment
> or
> the conditions of work
> of any such workmen.

By s. 32 of the Act, the terms of employment of Wong are governed by Industrial Court Award No: 117 of 1982. Article 16(1) of that Award provides:

> Transfers of employees between departments within a branch and transfers between branches of the Bank within the same city or town may be made by the Bank at any time at its sole discretion.

It is argued that the words 'connected with' in the definition of 'trade dispute' carry a limited meaning. To be a trade dispute, the dispute must relate to the terms itself e.g. as to what the terms of transfer ought to be or whether employees are liable to transfer. It is further argued that there are adequate provisions in the Act regarding the **implementation** of any terms in the Award, e.g.

(a) If it is alleged that the employee is being transferred because of his trade union activities, the remedy is s. 8 of the Act;

(b) The Union could apply to the Court for interpretation of Article 16(1) under s. 33 of the Act;

(c) The Union could lodge a complaint of non-compliance with Article 16(1) under s. 56 of the Act.

In my view "connected with" is an expression wide enough to include not only a dispute on the terms of employment itself but also if the dispute is concerned with interpretation of the existing terms or with their enforcement. What this means in practice is that any party to a collective agreement or bound by an award of the Industrial Court is at liberty to have a dispute between the employer and workmen arising out of any terms of the collective agreement or award, referred to the Industrial Court under ss. 26 or 33 or 56 of the Act. It all depends on the nature of the dispute but if there is any doubt then the proper course is a reference under s. 26 of the Act. In the instant case, the Industrial Court heard the reference under s. 26(2) of the Act and it therefore had jurisdiction to hear the dispute.

Merits

On the merits, the Industrial Court found:

> In considering the conditions of a man's employment, though the wages which he gets are very important, yet it is not wages alone that count; status and dignity have a great deal to do with other conditions of a man's service. Thus, the Claimant's (Wong) transfer is, in our view, not a fair one as it was done to humiliate him and to lower his status and dignity.

For the reasons given above, we hold that the Claimant's transfer is not *bona fide.* It is made by way of punishment in that his status and dignity have been appreciably lowered. And it will not be right for the Bank to transfer him to an inferior post even on the same wages. We, therefore, order that the Claimant be reinstated to his former post as a Book-keeper or to any recognised post established for a Special Grade Clerk within two weeks from date of this Award.

Section 33B(1) of the Act provides, *inter alia,* that an award of the Industrial Court "shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any Court." The Privy Council in *South - East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees' Union & Ors.* [1980] 2 MLJ 165 however, held that such a provision in the law will not have the effect of ousting the inherent supervisory power of the High Court to quash the decision by *certiorari* proceedings if the Industrial Court has acted without jurisdiction or in the excess of the limits of its jurisdiction, or **if it has done or failed to do something in the course of the inquiry** which is of such a nature that its decision is a nullity. In the instant case, Wong was transferred out of the Accounts Department on the same day he was asked to attend a preliminary inquiry with regard to the discrepancies in the accounts. On that day (22 December 1983) it had not yet been determined who was at fault because the inquiry had not even commenced. It cannot therefore be said that he was being punished or humiliated. The Bank had contended all along that the transfer was an interim measure to facilitate investigation of the falsifications. The Court has not given any reason why it did not accept the explanation given by the Bank. The issues of victimisation, status, dignity even unfairness did not arise out of the act of the transfer **from** the Accounts Department on 22 December. The Court asked itself the wrong questions because it did not address itself to the sole question before it, *viz.* whether the Bank had the right to transfer Wong from the Accounts Department on 22 December. The Bank clearly had the right under Article 16(1) of Award 117/82. It need not even give an explanation.

In my view the Court fell into the error of asking itself the wrong question by an over emphasis on the aftermath of the transfer. It is said that Wong had been transferred to an inferior post. In doing so the Court overlooked the fact that the posting to the Credit Administration Department was itself an interim measure and had to be carried out at short notice pending the outcome of the inquiry. Indeed the Court in para. 3 of the Award found that the Minister had referred the dispute to the Court even before the Bank had made a decision on the result of the inquiry. Be that as it may, Wong was not asked to do a menial job. In fact, at the Credit Administration Department his job was to oversee the overdraft accounts of the Bank's 25 branches. Further, Award 117/82 does not grade any particular clerical job, but grades the clerks.

Finally, the order of reinstatement itself is superflous because Wong has never lost his job as a Special Grade Clerk in the Bank; and the order of reinstatement as Book-keeper is contrary to Article 16(1) of Award 117/82 as it deprives the Bank's right to transfer its employees at its sole discretion. In my judgment, for the reasons stated and in all the circumstances of this case, the decision of the Industrial Court is a nullity and I accordingly grant *certiorari* to quash the Award of the Industrial Court with costs.

Also found at [1985] 1 CLJ 458